No. 22368

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. FOX, JR., ET AL., Appellants

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district judge, Honorable William N. Goodwin, did not write an opinion.

JURISDICTION

The jurisdiction of the district court over this condemnation action is founded on 28 U.S.C. sec. 1358. Notice of appeal was filed August 18, 1968 (R. 156), from final judgment entered June 2, 1967 (R. 148-151), and an order denying appellants' motion for a new trial entered June 26, 1967 (R. 155). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

ISSUES PRESENTED

1. Whether, at a jury trial in federal condemnation proceedings, the district court properly exercised its discretion in excluding evidence of a particular sale made under circumstances indicating that it was an unusual transaction probably

influenced by the project and not a fair indication of objective market value.

2. Whether, under the circumstances of this case, the district court properly refused to allow testimony concerning the cost of replacing the structures on the subject property.

STATEMENT

This appeal arises out of condemnation proceedings instituted by the United States to acquire land in Yakima County, Washington, for the construction of an Interstate Highway (R. 3, 4). Appellants, Mr. and Mrs. Fox, were the owners of approximately 6.77 acres of land. By declaration of taking filed August 31, 1964, the United States took fee simple title to 6.12 acres of this land and a perpetual assignable easement over another 0.31 of an acre (R. 23-26).[1/] The case was tried before a jury, along with the cases of two other landowners (Duncan and Olson), from March 20, 1967, to March 24, 1967 (Tr. 1-503). The jury deliberated simultaneously on all three cases and then made three separate awards in three verdicts. Appellants' motion for new trial was denied (R. 155), and they appealed (R. 156).

1/ It was agreed that the Fox's remaining 0.34 of an acre was rendered valueless (Tr. 376-377).

With respect to the Fox property, of concern here, the Government first presented two engineers who testified to its susceptibility to flooding (Tr. 31, 54-55, 61-62, 75). The remainder of the Government's case consisted of the testimony of two expert real estate appraisers. Ralph August Kann valued the land at $26,500 (Tr. 260), while George M. Lemon valued it at $26,800 (R. 296).

At a previous stage of the trial, when George M. Lemon had testified concerning the value of the Duncan property, opposing counsel (Mr. Hawkins)[2/] sought to elicit information concerning an alleged comparable sale from Floyd to Fox on August 24, 1964 (Tr. 165). At the request of government counsel, the jury was dismissed (Tr. 166), and debate on the admissibility of this Floyd-Fox transaction ensued (Tr. 167-181). During the course of this debate, a portion of a transcript from a prior condemnation trial before Judge Powell involving a different landowner, but the same comparable sale issue, was received by Judge Goodwin and made part of the record (Tr. 172).[3/]

2/ This same attorney represented the landowners in all of the trials here mentioned.

3/ This transcript appears at pages 85-119 of the record.

That transcript, in pertinent part, consisted of the testimony of William Fox (appellant here) as to the property he purchased from a Mr. Floyd in 1964. On direct examination, Fox testified he paid $1,500 an acre for this land (R. 93), and that its proximity to the highway had not influenced his purchase price (R. 93). On cross-examination and redirect, it was brought out that Fox did not sign a land contract to buy this property until November 10, 1964 (R. 95-96), and that only an earnest money receipt dated August 21, 1964, for which Fox had given $100, had existed prior to the Government's taking, August 31, 1964 (R. 97, 105). Fox further testified that the total purchase price stated in the contract was $12,000, that he paid $3,400 at the time of the formal contract (R. 97-98) and that, while the balance of the purchase price became due at the rate of $1,000 per year every August, he had not made any payments as they became due over and above his 29% deposit (R. 98-99). Also, appellant Fox acknowledged he knew at the time of purchase that the Interstate Highway would form one boundary of the land purchased (R. 100) and that his new property would be located 300 yards from a proposed interchange on the highway (R. 103). Indeed, appellants' counsel admitted that he had drawn the boundaries of the property with full knowledge of the location of the

highway and using it as the eastern boundary of the property, having known the location of the highway for some eight years (Tr. 177-181). The transcript indicates that Judge Powell refused to admit this Floyd-to-Fox transaction as a comparable sale because he did not consider it a sale on the open market (R. 106), and because it was the subject of project influence (Tr. 180-181).

Having reviewed this transcript, Judge Goodwin (Tr. 171) designated the Floyd-Fox transaction as "unusual" (Tr. 172). Impressed by the fact that Fox did not have to make the scheduled payments on the balance due and that the highway formed one boundary of the area encompassed by the sale, the judge sustained the Government's objection to the admission of the sale (Tr. 175, 180).

Later in the trial, a Mr. Clarence Marshall, a building contractor, testified on behalf of appellants (Tr. 316-317). Defense counsel attempted to elicit Marshall's opinion of the replacement cost of the Fox property. Upon objection, the judge ruled that such evidence was not admissible (Tr. 317, 330-346). Thereafter, defense counsel offered to prove that the witness Marshall would value the improvements alone, at $35,000, using the reproduction cost approach (Tr. 347-348).

In substance, the remainder of appellants' case consisted of Mr. Fox's own presentation of photographs of his property (Tr. 322-328) and the testimony of Marion L. Pierce,

a realtor, that the Fox property was worth $45,259, immediately prior to the taking (Tr. 376).

After being instructed by the judge, the jury returned a verdict of $29,500 as the just compensation for the Fox property (R. 147). Thereafter, judgment was entered in that amount (R. 148-151), and Fox's motion for a new trial denied (R. 155). This appeal followed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING THE FLOYD-TO-FOX "SALE"

It is firmly established that fair market value is the measure of just compensation as required by the Fifth Amendment to the Constitution of the United States. United States v. Miller, 317 U.S. 369, 373 (1943); Shoemaker v. United States, 147 U.S. 282 (1893). And such measure must result in compensation that is just not only to the landowner but also "to the public that must pay the bill." United States v. Commodities Corp., 339 U.S. 121, 123 (1950); United States v. New River Collieries, 262 U.S. 341, 344 (1923); Bauman v. Ross, 167 U.S. 548, 574, 575 (1897).

The best evidence of such fair market value is a prior sale of the same property. Baetjer v. United States, 143 F.2d 391, 397 (C.A. 1, 1944), cert. den., 323 U.S. 772; United States v. Certain Parcels in Philadelphia, 144 F.2d 626, 629-630 (C.A. 3, 1944); Dickinson v. United States, 154 F.2d 642, 643 (C.A. 4, 1946); United States v. Ham, 187 F.2d 265, 269-270 (C.A. 8, 1951); Love v. United States, 141 F.2d 981, 983 (C.A. 8, 1944); United States v. Becktold Co., 129 F.2d 473, 479 (C.A. 8, 1942). Absent such evidence, sales at arms' length of similar property are the best evidence of fair market value. Baetjer v. United States, supra, 143 F.2d at 397; United States v. Katz, 213 F.2d 799 (C.A. 1, 1954), cert. den., 348 U.S. 857; Hickey v. United States, 208 F.2d 269 (C.A. 3, 1953), cert. den., 347 U.S. 919; Welch v. Tennessee Valley Authority, 108 F.2d 95, 101 (C.A. 6, 1939), cert. den., 309 U.S. 688; United States v. Ham, supra, 187 F.2d at 269-270. Any sales offered on this basis must have been sales for cash or its equivalent. Kerr v. South Park Commissioners, 117 U.S. 379, 386-387 (1886); Shoemaker v. United States, 147 U.S. 282, 304 (1893); Olson v. United States, 292 U.S. 246, 255 (1934).

A. As a matter of law, the excluded transaction was inadmissible because it was not a sale for cash or its equivalent. - The transcript of the previous trial, which appellants offered (Tr. 171) and was made part of the record herein (R. 85-

119), reflects that Mr. Fox testified that he paid a down payment of 29% of the purchase price (R. 97-98) and was to pay $1,000 each year on the balance thereof (R. 98). Such testimony does not recite a sale for cash or its equivalent. This is so because the obligation to pay installments in futuro does not represent the present cash value of the property. Riley v. District of Columbia Redevelop. Land Agency, 246 F.2d 641, 643 (C.A. D.C. 1957). Clearly, the purchaser for cash here would pay less than the amount arrived at by adding Fox's down payment and the $1,000 a year payments spread over a period of years. In order to be admissible, some testimony must be elicited to show the present cash value of this future sum of money due under the terms of the transaction. United States v. Certain Parcels in City of Philadelphia (Wainwright), 144 F.2d 626, 630 (C.A. 3, 1944). See also, United States v. Leavell & Ponder, Inc., 286 F.2d 398, 404 (C.A. 5, 1961), cert. den., 366 U.S. 944. Mr. Fox did not supply such testimony, nor was such forthcoming during the offer of proof made by his counsel (Tr. 177-181). The "sale" therefore was inadmissible as a matter of law.

B. The district court had a broad discretion to exercise in excluding or including sales evidence. - This Court has consistently held that the district court has a

broad discretionary power to admit or exclude sales evidence in condemnation cases. Winston v. United States, 342 F.2d 715, 720-721 (C.A. 9, 1965); Likins-Foster Monterey Corporation v. United States, 308 F.2d 595, 602 (C.A. 9, 1962); Fairfield Gardens, Inc. v. United States, 306 F.2d 167, 172 (C.A. 9, 1962); United States v. Johnson, 285 F.2d 35, 40-41 (C.A. 9, 1960). This Court has, therefore, consistently refrained from overturning the trial judge's exercise of this discretion where no manifest abuse thereof is clearly demonstrated by the record.

The sales, to be admissible, must be "comparable sales," i.e., sales of similar property, not too distant in time, consummated in a free and open market place. The discretion of the district court in judging the "comparability" of a sale was defined in Fairfield Gardens, Inc., supra (at 172-173):

> In the field of real estate valuation it has long been the rule that sales of other property are not admissible unless the other property is comparable. And comparability, while it does not mean identity, because each parcel of real property differs from every other parcel, does mean, at the very least, similarity in many respects. Here, the dissimilarities seem to us far more striking than the similarities. Under these circumstances, we do not think that the court abused its discretion in excluding the evidence.

If the property meets this criterion the sale may yet be excluded because of the nature of the transaction.

It has long been established that sales offered as evidence of value must be on the open market, that is, transactions between a willing buyer and a willing seller, eliminating those factors which "must in fairness be eliminated in a condemnation case." United States v. Miller, 317 U.S. 369, 374-375 (1943); Shoemaker v. United States, 147 U.S. 282 (1893). Thus, sales consummated after the date of taking have been excluded because of probable project influence. Shoemaker, supra; Jayson v. United States, 294 F.2d 808, 810 (C.A. 5, 1961); International Paper Company v. United States, 227 F.2d 201, 209 (C.A. 5, 1955). And the court in Anderson v. United States, 179 F.2d 281 (C.A. 5, 1950), took judicial notice that government projects influence values of adjacent properties. Similarly, sales of property of special value to the purchaser are not admissible. United States v. 124.84 Acres in Warrick County, Ind., 387 F.2d 912, 916 (C.A. 7, 1968); see Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). And sales not consummated for cash or its equivalent are excluded. United States v. Leavell & Ponder, Inc., 286 F.2d 398 (C.A. 5, 1961), cert. den., 366 U.S. 944. So, the type of transaction, as well as the similarity of the property, is a crucial factor in judging the relevancy of a proffered sale.

C. Under the facts of this case, the particular exercise of discretion was clearly a proper one. - The purported sale, from Floyd to Fox, offered by Mr. Fox and excluded by the district court, was a transaction begun only 10 days before the date of taking by the execution of an earnest money receipt for $100 (R. 97, 105). The formal contract was executed some 40 days after the date of taking and Mr. Fox has not paid any of the payments called for in this contract over and above his down payment (R. 97-99). Additionally, Mr. Fox testified that he knew at the time of this transaction that the highway, subject of this project, formed one boundary of the "Floyd-to-Fox" land and was some 300 yards from a proposed interchange (R. 100, 103). Such knowledge extended back some eight years prior to the taking and allowed appellants' counsel to specify exactly the eastern line of the property so not to encroach on the highway easement (Tr. 177-181).

The district court reviewed the transaction and the attempted offer of it in a previous trial of an adjacent tract (Tr. 171). The court observed that the judge in the previous trial had rejected the sale as being influenced by the project and not a sale on the open market (Tr. 171). The court characterized the sale as "unusual" because the terms of the earnest

moeny agreement were not incorporated in the contract of sale and the payments on the balance due were "deferred on the proposal that when the purchaser got the money he would pay it" (Tr. 172). The court continued: "In my limited experience of some thirty years I have never heard of that kind of a sale of land, particularly where it was to be used as this was to be" (Tr. 172). Acknowledging that it was not bound by the rejection of the sale in a previous trial, the court nevertheless concluded that this was not an open market sale and excluded it (Tr. 172, 175). After allowing an offer of proof, the court became convinced that the transaction was additionally influenced by the project and inadmissible (Tr. 177-181). In deciding to exclude the transaction, the court weighed all the factors presented as they appeared before it. Such special accessibility to these factors, to witnesses, and to evidence, forms the logical basis for allowing a trial judge wide discretion in ruling on evidentiary questions. Herein, the district court's exclusion of the sale was a sound exercise of such discretion and should not be overturned by this Court.

II

THE DISTRICT COURT PROPERLY REFUSED TO ALLOW TESTIMONY CONCERNING THE COST OF REPLACING THE STRUCTURES ON THE SUBJECT PROPERTY

When Mr. Clarence Marshall took the stand on behalf of the appellants, government counsel objected to Mr. Marshall giving his opinion as to the cost of replacing the structures on the property subject to the taking herein (Tr. 317). The basis of the objection was that the replacement cost less depreciation method of valuation should be used only where no fair market value for the property could be established by reference to recent sales of comparable properties.

The district court distinguished the present situation from that where replacement cost is used to evaluate business or church property (Tr. 317), to rebut testimony (Tr. 318, 337-338), to test expert opinion (Tr. 320), and to show unique value (Tr. 339-342). Having reviewed the rules of several circuits (Tr. 330-334), the court ruled that the proffered testimony was inadmissible (Tr. 343, 346), allowing appellants to make an offer of proof (Tr. 346-348).

Replacement or reproduction cost less depreciation is one of the least reliable indicia of market value. United States v. Certain Interests in Champaign County, Illinois, 271

F.2d 379, 382 (C.A. 7, 1959), cert. den., 362 U.S. 974. At best, such method of valuation merely establishes a ceiling price or "upper limit beyond which a fair appraisal cannot ordinarily go." 2 Orgel, Valuation Under Eminent Domain (2d ed. 1953) sec. 188, pp. 3-4. Such testimony is generally of little or no probative value when comparable sales are available. United States v. Miller, 317 U.S. 369, 374-375 (1943). It assumes greater significance where there are insufficient sales from which to find fair market value, United States v. Benning Housing Corporation, 276 F.2d 248, 251 (C.A. 5, 1960), where the available sales are not comparable, United States v. Baker, 279 F.2d 603, 605 (C.A. 9, 1960), or where sales of the type of property are rare. United States v. Certain Property in the Borough of Manhattan, 344 F.2d 142, 151 (C.A. 2, 1965).

The district court recognized that replacement cost less depreciation was an acceptable substitute for comparable sales in certain cases. But it clearly and correctly distinguished the instant case from one in which this secondary method of finding market value would be appropriate. Furthermore, the court had before it considerable evidence of comparable sales. It obviously felt that a replacement cost approach would not be relevant under the circumstances. In this it was

correct. Such decision on its part was manifestly within the court's wide discretion to accept or reject evidence of value, as we discussed above, whether such be sales or other types of evidence of value. And the case against the use of the replacement cost method is even stronger when, as herein, it was to be used as direct proof of value, not as background for an expert's opinion. Fairfield Gardens, Inc. v. United States, 306 F.2d 167, 174 (C.A. 9, 1962); United States v. Johnson, 285 F.2d 35, 39 (C.A. 9, 1960); Carlstrom v. United States, 275 F.2d 802, 808 (C.A. 9, 1960).

The record and the transcript reflect a judicious exercise of discretion by the district court and such exercise should not be disturbed on appeal.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed and the decision below affirmed.

Respectfully submitted,

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